PD-1265-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/10/2019 10:12 AM
Accepted 5/10/2019 11:03 AM
DEANA WILLIAMSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

MICHAEL RAY SENN, *APPELLANT*	§	FILED COURT OF CRIMINAL APPEALS 5/10/2019 DEANA WILLIAMSON, CLERK
V.	§	NO. PD-1265-18
THE STATE OF TEXAS, *APPELLEE*	§	

ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS IN CAUSE NUMBER 02-15-00201-CR REVERSING AND REMANDING THE TRIAL COURT'S JUDGMENT ON PUNISHMENT IN CAUSE NUMBER 1308222R IN THE 213TH DISTRICT COURT OF TARRANT COUNTY, TEXAS

STATE'S BRIEF ON THE MERITS

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Identity of Judges, Parties, and Counsel

Pursuant to TEX. R. APP. P. 38.1, the following is a complete list of all parties to the trial court's judgment and the names and addresses of all trial and appellate counsel:

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4. Sharen Wilson, Criminal District Attorney, attorney for the State, her assistants at trial, Page Simpson and Erin Cofer, and her assistants on appeal, Joseph W. Spence and Helena F. Faulkner, ccaappellatealerts@tarrantcountytx.gov, 401 W. Belknap St., Fort Worth, TX, 76196-0201.

5. Hon. Louis Sturns, judge presiding at trial.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Statement of the Case

A Tarrant County jury convicted Appellant of sexual assault as alleged in count one of the indictment.[1] CR 1: 175; RR 4: 123. It also affirmatively answered the submitted special issue statutorily enhancing the sexual-assault conviction from a second-degree felony to a first-degree felony under section 22.011(f) of the Texas Penal Code. CR 1: 175; RR 4: 124. The jury sentenced Appellant to confinement for life for sexual assault. CR 1: 184; RR 5: 94.

[1] Appellant's conviction and twenty-year sentence for prohibited sexual conduct are not at issue here. CR 1: 176, 186; RR 4: 124; RR 5: 94.

Statement of Procedural History

Appellant raised four points of error in the Court of Appeals for the Second District of Texas, including a challenge to the sufficiency of the evidence to trigger the enhancement provisions of section 22.011(f). *Senn v. State (Senn I)*, 551 S.W.3d 172 (Tex. App.—Fort Worth 2017), *vacated & remanded*, 2017 WL 5622955 (Tex. Crim. App. November 22, 2017) (per curiam) (not designated for publication). The court affirmed the trial court's judgment. *Id*. This Court granted Appellant's petition for discretionary review. *State v. Senn (Senn II)*, 2017 WL 5622955 (Tex. Crim. App. November 22, 2017) (per curiam) (not designated for publication). It vacated the court of appeals' judgment in *Senn I* and remanded the cause because the lower court did not have the benefit of the subsequent opinion in *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017). *Senn II*, 2017 WL 5622955 at *1.

The court of appeals issued an opinion on remand on May 17, 2018, finding the evidence insufficient to trigger section 22.011(f)'s enhancement provision. *See Senn v. State (Senn III)*, No. 02-15-00201-CR (Tex. App.—Fort Worth May 17, 2018), *withdrawn on reh'g*, 2018 WL 5291889 (Tex. App.—Fort Worth October 25, 2018, pet. granted). On June 1, 2018, the State filed a motion for rehearing and a motion for rehearing en banc. On

October 25, 2018, a majority of the court of appeals' panel denied the State's motion for rehearing, withdrew its prior opinion, and substituted its new published opinion and judgment. *Senn v. State (Senn IV)*, ___ S.W.3d ___, 2018 WL 5291889 at *1 (Tex. App.—Fort Worth October 25, 2018, pet. filed) (op. on remand & on reh'g). The court sustained Appellant's first point of error, modified the trial court's judgment on Appellant's sexual-assault charge to reflect a conviction for a second-degree felony, reversed the trial court's judgment for sexual assault as to punishment, and remanded the sexual-assault case to the trial court for a new trial on punishment. *Id*. at *2.

The *Senn IV* majority opinion concluded that, for the section 22.011(f) enhancement to apply, the State was required to prove facts constituting one of the six bigamy prohibitions set forth in section 25.01 of the Texas Penal Code (*i.e.*, that Appellant "took, attempted, or intended to take any action involving marrying or claiming to marry [BS] or living with [BS] under the appearance of being married"). *Id*. at *5-6. Contrary to the majority's reasoning, Justice Gabriel concluded in her dissenting opinion that the State's proof that Appellant sexually assaulted BS and that he was married to someone else at the time of the assault was sufficient to invoke the

enhancement provisions of section 22.011(f).[2] *Id*. at *8 (Gabriel, J., dissenting op. on remand & on reh'g).

On December 27, 2018, the State timely filed its petition for discretionary review. This Court granted the State's petition on April 10, 2019. This State's brief is due by May 10, 2019.

[2] The majority, on the other hand, concluded that "[e]vidence of the sexual assault and of [Appellant's] marriage license to [BS's] step-mother, standing alone, do not amount to facts constituting one of the six bigamy prohibitions under section 25.01." *Senn IV*, 2018 WL 5291889 at *6.

Statement of Facts

In short, Appellant sexually assaulted and impregnated his biological daughter BS while he was married to RS. *Senn IV*, 2018 WL 5291889 at *1. BS has an IQ of 64 and has been diagnosed with mild intellectual disability and attention deficit hyperactivity disorder. RR 3: 44, 66, 115, 135; RR 4: 21.

In January 2011, eighteen-year-old BS moved in with Appellant, her stepmother RS, and her two younger siblings. RR 3: 68-69, 87, 91, 117, 134. One night in May 2011, Appellant entered the bedroom where BS, his younger daughter, and his best friend's daughter were sleeping. RR 3: 118-19. Appellant smelled like beer. RR 3: 119. He told BS "to get out of bed, clothes off, and on hands and knees." RR 3: 119. BS complied by undressing and getting on her hands and knees. RR 3: 120-22. Appellant then "put his private part into [hers]." RR 3: 122, 130, 142. BS did not know that what Appellant was doing to her was sex, and she did not know that someone could have a baby from having sex. RR 3: 123. When Appellant finished, he left the room, and BS returned to bed. RR 3: 123.

As a result of the sexual assault, BS became pregnant with Appellant's child. RR 3: 123, 145, 167-68, 171. She continued living with Appellant until she gave birth to a baby girl on January 14, 2012. RR 3: 78; RR 6: St. Ex. 4. Based on conversations with doctors and nurses, BS's great aunt KG was

concerned about BS going home from the hospital with Appellant. RR 3: 79. BS went home with KG because there was no other safe place for her to go, and she never returned to Appellant's house. RR 3: 80, 128; RR 4: 33. BS gave the baby up for adoption before Valentine's Day because she wanted the baby to have a better life than she had. RR 3: 129.

BS eventually told KG about Appellant sexually assaulting her, and they reported the crime to the police on February 16, 2012. RR 3: 22-23, 26-27, 81, 138. While Appellant was in jail awaiting trial, his sister visited him to inform him that his wife RS was hospitalized with a brain tumor. RR 4: 37. She confronted him about what she thought had happened regarding BS. RR 4: 33-34. After avoiding the question three times, Appellant finally responded: "If you want it and the girl doesn't say, 'No,' so you do it anyway, that's not rape is it?" RR 4: 34.

Issues Presented

1. The court of appeals erred in concluding that section 22.011(f) of the Texas Penal Code requires the State to prove commission of an actual bigamy offense to elevate Appellant's punishment range for sexual assault to a first-degree felony offense.

2. The court of appeals' decision requiring the State to prove an actual bigamy offense under section 22.011(f) of the Texas Penal Code is contrary to *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017).

3. The court of appeals erred in disregarding the clarification contained in footnote 9 of *Arteaga* merely because it was relegated to a footnote.

Summary of the State's Arguments

The lower court wrongly concluded that section 22.011(f) of the Texas Penal Code applies only to cases involving sexual assault coupled with actual bigamous conduct. The plain language of section 22.011(f), as well as this Court's *Arteaga* opinion, required the State to establish that the bigamy statute *would* prohibit Appellant from marrying BS, which the State did by proving that he was married to RS when he sexually assaulted BS.

Arguments and Authorities Supporting the Issues Presented

I. Applicable Law

A. Statutory Provisions

Sexual assault is generally a second-degree felony. *See* TEX. PENAL CODE § 22.011(f). The offense is a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under [s]ection 25.01 [of the Texas Penal Code]." *Id*.

Section 25.01 defines the offense of bigamy in relevant part as follows:

> (a) An individual commits an offense if:
>
> (1) he is legally married and he:
>
> (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
>
> (B) lives with a person other than his spouse in this state under the appearance of being married; or
>
> (2) he knows that a married person other than his spouse is married and he:
>
> (A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage; or
>
> (B) lives with that person in this state under the appearance of being married.

> (b) For purposes of this section, "under the appearance of being married" means holding out that the parties are married with cohabitation and an intent to be married by either party.

TEX. PENAL CODE § 25.01.

B. *Arteaga v. State*

In *Arteaga*, the State argued that Arteaga's sexual assault of his biological daughter should be enhanced to a first-degree felony under section 22.011(f) of the Texas Penal Code because he was "prohibited from marrying" his biological daughter. 521 S.W.3d at 331-32. The abstract portion of the trial court's charge included the language of section 6.201 of the Texas Family Code, which defines when a marriage is void based on consanguity. *Id*. at 332-34; *see* TEX. FAM. CODE § 6.201. Arteaga alleged that the State was confined to proving he was "prohibited from marrying his daughter" under the terms of the bigamy statute and could not rely on the consanguity provisions of the Texas Family Code. *Arteaga*, 521 S.W.3d at 332; *see* TEX. PENAL CODE § 25.01 (defining offense of bigamy).

A majority of this Court initially addressed Arteaga's argument by reviewing whether the phrase "under [s]ection 25.01" at the end of section 22.011(f) modifies only the second section of section 22.011(f) (*i.e.*, the "living under the appearance of being married" section) or also modifies the first section (*i.e.*, the "marrying" and "purporting to marry" section). *Arteaga*,

521 S.W.3d at 335-36. The majority of this Court held that an ambiguity exists and resolved it as follows:

> We, however, conclude that the State is required to prove facts constituting bigamy under all three provisions of 22.011(f), that is, when the defendant was prohibited from (1) marrying the victim or (2) claiming to marry the victim, and when the defendant was prohibited from (3) living with the victim under the appearance of being married.

Id. at 335 (footnote omitted). Footnote 9, which immediately followed this holding, provided the following guidance about what the State must prove to satisfy its burden:

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault under [s]ection 22.011(f), the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy.

Id. at 335 n.9 (emphasis in original).

In a concurring opinion, Judge Yeary relied heavily on footnote 9 in deciding to join the Court's majority opinion:

> In a footnote, the Court explains that it means only to recognize a requirement that, in order to invoke [s]ection 22.011(f), the State must prove that, *if* the actor were to actually marry or purport to marry his victim, or to live with his victim under the appearance of being married, then he would commit the offense of bigamy. Majority Opinion at 10 n.9. But the State need not "prove facts constituting bigamy" in the sense that it must prove

> the actor *actually* committed bigamy. In light of this explanation, I join the Court's opinion.

Id. at 341 (Yeary, J., concurring) (emphasis in original). After offering a well-reasoned analysis of why section 22.011(f) would never require the State to prove facts that the actor actually committed bigamy, Judge Yeary again referred to the majority opinion's footnote 9: "Though to my mind some of the language in the text of the Court's opinion remains ambiguous, the Court's clarification in footnote 9 satisfies me that the Court's understanding is the same as my own." *Id*. at 341-44.

C. Current Split Among Courts of Appeals in Interpreting *Arteaga*

Courts of appeals differ over how to reconcile this Court's language in the body of its *Arteaga* opinion with footnote 9. The Second Court of Appeals in this case and the Seventh Court of Appeals interpreted *Arteaga* to require facts proving an actual bigamy offense; merely proving that the accused was married when the assault occurred was not enough. *Lopez v. State*, 567 S.W.3d 408, 410-13 (Tex. App.—Amarillo 2018, pet. granted); *Senn IV*, 2018 WL 5291889 at *2-5. The First Court of Appeals, on the other hand, concluded that *Arteaga* does not require the State to prove an actual bigamy offense; the State need only establish that the accused would be guilty of bigamy if he were to marry his victim. *Rodriguez v. State*, ___ S.W.3d ___, 2018 WL

6318471 at *1-6 (Tex. App.—Houston [1st Dist.] December 4, 2018, pet. granted). On April 10, 2019, this Court granted petitions for discretionary review in *Senn*, *Lopez*, and *Rodriguez* to resolve the question of whether section 22.011(f) requires the State to prove sexual assault coupled with actual bigamy.

II. The Trial Court's Charge and the Jury's Findings

In addition to instructing the jury on the offense of sexual assault alleged in count one of the indictment, the trial court's charge included the following special issue tracking section 22.011(f) of the Texas Penal Code:

> Do you find beyond a reasonable doubt that at the time the offense of sexual assault, as set out above, was committed, [BS] was a person whom [Appellant] was prohibited from marrying or purporting to marry or with whom [Appellant] was prohibited from living under the appearance of being married?

CR 1: 171-72, 175; *see* TEX. PENAL CODE § 22.011(f). The jury responded affirmatively, thus making the sexual-assault offense a first-degree felony and increasing the punishment range to confinement for five to ninety-nine years or life. CR 1: 175, 180; *see* TEX. PENAL CODE §§ 12.32(a), 22.011(f). The jury sentenced Appellant to confinement for life. CR 1: 184; RR 5: 94.

III. The Evidence Is Sufficient to Convict Appellant of First-Degree Sexual Assault Pursuant to TEX. PENAL CODE § 22.011(f)

The linchpin of Appellant's argument on appeal has been that convicting him of first-degree sexual assault under section 22.011(f) required the State to prove that he was *actually* committing a bigamy offense under section 25.01 with BS at the time he sexually assaulted her. The lower court agreed with Appellant. *See Senn IV*, 2018 WL 5291889 at *2-5. The State's position throughout has been that no such proof was required, a position which this Court's *Arteaga* opinion supports.

A. The Fort Worth Court of Appeals' Majority Opinion Misinterprets *Arteaga*

The court of appeals' majority opinion relied heavily on what it perceived to be an inconsistency between certain language in the body of the *Arteaga* majority opinion and footnote 9.[3] *See Senn IV*, 2018 WL 5291889 at *3-4. The court of appeals' majority opinion notes:

> After arduous study, we are unable to reconcile footnote 9's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts that would constitute bigamy—with the *Arteaga* opinion's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts constituting bigamy.

[3] Resolving this perceived inconsistency was also the focus of the courts of appeals in *Lopez* and *Rodriguez*.

Id. at *4. The majority notes that the "facts that would constitute bigamy" language in footnote 9 is not used in the sentence immediately preceding footnote 9, but in a prior sentence summarizing the lower court's holding. *See id*. at *4. Logically, footnote 9 must be interpreted as clarifying the sentence immediately preceding it. *See Arteaga*, 521 S.W.3d at 335 & n.9. Moreover, Judge Yeary's discussion of footnote 9 in his concurring opinion, as previously set forth herein, supports the State's interpretation of footnote 9 as allowing Appellant's conviction of first-degree sexual assault in this case. *See id*. at 341-44 (Yeary, J., concurring).

Rather than recognize that footnote 9 in *Arteaga* is a clarifying footnote, the lower court's majority opinion instead turns to this Court's prior pronouncements that it is not constrained to follow its own footnotes. *See Senn IV*, 2018 WL 5291889 at *5. However, this Court has never stated that its footnotes should be disregarded as meaningless. Justice Gabriel correctly identified the error in the majority's reasoning as follows:

> But I disagree with the majority to the extent its choice is based on the location of the "would have constituted" holding in the court of criminal appeals' opinion. The court of criminal appeals has held that it is not constrained to follow its own footnotes, but it has recognized that it is bound by footnotes authored by the United States Supreme Court. *See Gonzales v. State*, 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014) (stating *in a footnote* that although it is not "bound" by its footnote holdings, it is bound by Supreme Court holdings contained in footnotes). As the court of criminal appeals is bound by the court tasked with the

> discretionary review of its opinions, we also should be bound by the court of criminal appeals' similar directives to us. Further, the court of criminal appeals frequently relies on its own footnotes, weakening its prior pronouncements that footnotes have minimal precedential value. *See, e.g.*, *Estes v. State*, 546 S.W.3d 691, 699 & n. 50 (Tex. Crim. App. 2018) (quoting *Arteaga*, 521 S.W.3d at 335 n.9 for that opinion's holding); *McClintock v. State*, 444 S.W.3d 15, 20 & n.20 (Tex. Crim. App. 2014) (citing *State v. Gobert*, 275 S.W.3d 888, 891-92 n.12 (Tex. Crim. App. 2009) as support for what the court previously "held"); *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (citing *Boykin v. State*, 818 S.W.2d 782, 785-86 & 786 n.4 (Tex. Crim. App. 1991) to support legal holding). *See generally Gonzales*, 435 S.W.3d at 813 n.11 ("Finally, it is not clear how much precedential value a pronouncement delivered by this Court in a footnote should carry, considering that we have stated [in a footnote] that footnotes 'should receive minimal precedential value.'") (quoting *Young v. State*, 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991)). Disregarding the placement of a court of criminal appeals' holding—in the text or in a footnote—seems appropriate especially because the court of criminal appeals recently and routinely began placing all of its supporting citations in footnotes. *See, e.g.*, *Beham v. State*, [559 S.W.3d 474, 474-82 (Tex. Crim. App. 2018)]; *White v. State*, 549 S.W.3d 146, 147–58 (Tex. Crim. App. 2018).

Id. at *7 (Gabriel, J., dissenting op. on remand & on reh'g).

Additionally, the majority opinion below relies too heavily on this Court's use and placement of the "facts constituting bigamy" versus "would constitute bigamy" language throughout the *Arteaga* opinion. *See Senn IV*, 2018 WL 5291889 at *4. Frankly, the lower court's majority opinion appears to draw a distinction between "facts constituting bigamy" and "would constitute bigamy" where none was intended. A reading of *Arteaga* as a

whole, including footnote 9, shows that this Court likely used the phrases interchangeably without intending them to convey a significantly different meaning. As Justice Gabriel correctly explained in her dissenting opinion below:

> In any event, the court of criminal appeals did not stop at its "facts constituting bigamy" holding in the text. In *Arteaga*, Judge Kevin Yeary filed a concurring opinion that addressed the inconsistency between the text and footnote 9 and posited that the correct holding was that "the State need not 'prove facts constituting bigamy' in the sense that it must prove the actor *actually* committed bigamy." 521 S.W.3d at 341 (Yeary, J., concurring). Indeed, he concluded that because footnote 9 clarified the court's holding that the facts need only show bigamy would have been committed if the perpetrator were to marry the victim, he was "satisfie[d] . . . that the Court's understanding [was] the same as [his] own." *Id.* at 344. The *Arteaga* majority did not respond to Judge Yeary's stated understanding of its holding.
>
> Almost a year after *Arteaga*, the court of criminal appeals again addressed the sexual-assault enhancement in *Estes*. 546 S.W.3d at 699-702. The *Estes* court relied on *Arteaga* and began its analysis of section 22.011(f)—the sexual-assault enhancement—by summarizing the *Arteaga* holding to be that as stated in footnote 9: "We have interpreted Section 22.011(f) as essentially requiring proof 'that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'" *Id.* at 699 & n.50 (quoting *Arteaga*, 521 S.W.3d at 335 n.9). Therefore, the court of criminal appeals recognized that its holding in *Arteaga* required the State to establish that the alleged offense would constitute bigamy if the victim and the perpetrator were married or held themselves out to be married, not that bigamy was actually committed.

Senn IV, 2018 WL 5291889 at *8 (Gabriel, J., dissenting op. on remand & on reh'g) (emphasis in original).

B. The Plain Text of § 22.011(f) Does Not Require the State to Prove an Actual Bigamy Offense

The express language of section 22.011(f) does not require the accused to have committed an actual bigamy offense in violation of section 25.01. *See* TEX. PENAL CODE § 22.011(f). Rather, section 22.011(f) applies based on the victim's status as a person whom the defendant "*was prohibited from* marrying or purporting to marry or with home the actor *was prohibited from* living under the appearance of being married under [s]ection 25.01 [of the Texas Penal Code.]" *Id*. (emphasis added). The provision requires only that a marriage to the victim be *prohibited* by section 25.01, not that a bigamous marriage *actually* occur. *See id*.; *Arteaga*, 521 S.W.3d at 335 n.9; *Arteaga*, 521 S.W.3d at 341-44 (Yeary, J., concurring); *Rodriguez*, 2018 WL 6318471 at *5-6; *see also Estes*, 546 S.W.3d at 699 (summarizing *Arteaga* holding using language of footnote 9). This Court in *Estes* stated, "We have previously acknowledged that the literal language of [s]ection 22.011(f) accomplishes more than merely punishing actual instances of bigamy." *Estes*, 546 S.W.3d at 699 (citing *Arteaga*, 521 S.W.3d at 355 & n.9).

Had the Legislature intended section 22.011(f) to require facts amounting to an actual bigamy offense, it would have chosen language

requiring the victim to be a person whom the defendant *did* marry, purport to marry, or live with under the appearance of being married in violation of section 25.01. However, the Legislature did not do so. *See Benson v. State*, 476 S.W.3d 136, 140 (Tex. App.—Austin 2015, pet. ref'd) (citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("We presume the Legislature chooses a statutes language with care, including each word chosen for a purpose, while purposefully omitting words not chosen")). The courts should not judicially impose an additional requirement on the State to prove an actual bigamy offense under section 25.01 that was neither indicted nor required by the plain language of section 22.011(f) in Appellant's sexual-assault trial.

C. The State Met Its Burden Under Section 22.011(f)

The court of appeals majority erred in concluding that *Arteaga* required it to do anything other than affirm the trial court's judgment. The State proved unequivocally that Appellant was married to RS when he sexually assaulted BS.[4] RR 3: 91-93, 117, 189; RR 6: St. Ex. 2. Thus, there can be no doubt that *if* Appellant were to marry or claim to marry BS or to live with BS under the appearance of being married, he *would* be guilty of bigamy. *See* TEX. PENAL

[4] While application of § 22.011(f) in *Arteaga* relied solely on the biological relationship of the unmarried Arteaga to the victim, *see Arteaga*, 521 S.W.3d at 331-32, the State here did not rely solely on the biological relationship between Appellant and BS.

CODE § 25.01. This is the very factual scenario that *Arteaga* approved as meeting the requirements of section 22.011(f). *See Arteaga*, 521 S.W.3d at 335 n.9; *see also id*. at 341, 344 (Yeary, J., concurring); *Rodriguez*, 2018 WL 6318471 at *5-6; *Senn IV*, 2018 WL 5291889 at *7-8 (Gabriel, J., dissenting op. on remand & on reh'g). As Justice Gabriel stated in her dissenting opinion, this Court "has twice stated that the State need only introduce evidence showing that the defendant would have been guilty of bigamy if he were to marry or claim to marry his victim," and the State "met its burden of proof regarding the enhancement allegation." *Senn IV*, 2018 WL 5291889 at *7 (Gabriel, J., dissenting op. on remand & on reh'g).

Conclusion

Neither *Arteaga* nor the plain language of section 22.011(f) of the Texas Penal Code require the State to prove an actual bigamy offense; rather, the State must prove facts which *would* constitute an offense. The evidence is sufficient to trigger the statutory enhancement of Appellant's sexual-assault offense under section 22.011(f) because the State proved unequivocally that Appellant was married to RS when he sexually assaulted BS. Therefore, the court of appeals majority erred in modifying the trial court's judgment to reflect a conviction for a second-degree felony offense of sexual assault and remanding the cause for a new punishment trial.

Prayer for Relief

The State prays that this Court reverse the court of appeals' judgment modifying the trial court's judgment and remanding the cause for a new punishment trial. The State further prays that this Court affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

The total number of words in this State's Brief on the Merits, exclusive of the matters allowed to be omitted, is 4,338 words as determined by the word count feature of Microsoft Office Word 2016.

/s/ Helena F. Faulkner
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Certificate of Service

A true copy of the State's brief has been e-served on Appellant's counsel, William R. Biggs, wbiggs@williambiggslaw.com; and to Stacey M. Soule, State Prosecuting Attorney, information@spa.tex.gov, on May 10, 2019.

/s/ Helena F. Faulkner
HELENA F. FAULKNER